Supreme Court, U. S.
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No. 80-1183

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF MISSISSIPPI,
Appellant,

v.

BENJAMIN E. CIVILETTI and
THE UNITED STATES OF AMERICA,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to hear an interlocutory appeal pursuant to the direct appeal procedure under 42 U.S.C. § 1973c and *NAACP v. New York*, 413 U.S. 345 (1973).

2. Whether an order granting a motion to disqualify counsel is a final decision on a collateral matter so as to qualify for appeal pursuant to 42 U.S.C. § 1973c and 28 U.S.C. §§ 1253, 1291, and 2284 under the "collateral order" doctrine espoused in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

3. Whether a submission made in 1979 pursuant to section 5 of the Voting Rights Act is the same matter as a submission made in 1970 when based upon a different statute passed by a different legislature and, if the same matter, whether the Government waived its right to seek disqualification by failing to raise the issue in a prior Voting Rights Act case involving the same issues.

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court is not reported and is reproduced in the Appendix.

JURISDICTION

This is a direct appeal by the State of Mississippi (the State) from the judgment of the United States District Court for the District of Columbia entered on October 28, 1980, ordering the disqualification of the State's counsel

and the separation of counsel and his law firm from further participation in a de novo section 5 review of a submission by the State pursuant to the Voting Rights Act of 1965 as amended, 42 U.S.C. §§ 1973 *et seq.*, seeking the implementation of an "open primary" for all elected officials in the State. Jurisdiction also was invoked pursuant to 28 U.S.C. § 1331. Notice of Appeal was filed in the United States District Court for the District of Columbia on October 28, 1980. The jurisdiction of this Court is invoked under 42 U.S.C. § 1973c.

STATUTE INVOLVED

The statute involved is section 5 of the Voting Rights Act:

> Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different

from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of

three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

Voting Rights Act § 5, 42 U.S.C. § 1973c.

STATEMENT OF THE CASE

From February 1969 until May 1971, Jerris Leonard served as Assistant Attorney General for Civil Rights. In 1970, the State of Mississippi (the State) submitted to the Attorney General House Bills 362 and 363, which contained changes in Mississippi's electoral system, for preclearance pursuant to section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. On September 21, 1970, Mr. Leonard responded to that submission, stating that the Attorney General was "not prepared [within the required statutory period] to make any determination of the validity or invalidity [of the changes] under the Voting Rights Act."[1] Letter from Jerris Leonard to A. F. Summer at 2 (Sept. 21, 1970), attached as Exhibit 1 to Memorandum in Opposition to Defendants' Motion for Order Disqualifying Plaintiff's Counsel (Opposition Memorandum).

On February 25, 1974, Mississippi resubmitted House Bills 362 and 363 to the Attorney General. At that time, Mr. Leonard's successor as Assistant Attorney General for Civil Rights, J. Stanley Pottinger, characterized the 1970 submission as "prior *similar* proposals" and objected to their implementation. Letter from J. Stanley Pottinger to A. F. Summer at 2 (Apr. 26, 1974) (emphasis added), attached as Exhibit 2 to Opposition Memorandum. Mr. Pottinger found that the *Evers* case "foreclosed" any further action on the 1970 submission. *Id.*

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[1] Subsequently, the United States District Court for the Southern District of Mississippi held that the Department's failure to approve the bills precluded their implementation. *Evers v. State Board of Election Commissioners*, 327 F.Supp. 640 (S.D.Miss. 1971) (per curiam), *appeal dismissed*, 405 U.S. 1001 (1972).

In 1976, the United States District Court for the Southern District of Mississippi, pursuant to *Connor v. Johnson*, 330 F.Supp. 506, *supplemented in* 330 F.Supp. 521 (S.D.Miss. 1971) (per curiam), formulated an apportionment plan for the 1979 quadrennial election. *Connor v. Finch*, 419 F.Supp. 1072 (S.D.Miss. 1976). The Department of Justice intervened sometime between June 10, 1975, and August 24, 1976. *See Connor v. Finch*, 431 U.S. 407, 412 n.8 (1977). Thereafter, Mr. Leonard was retained to represent Mississippi before the Supreme Court. "The issue primarily presented and argued [was] whether the District Court plan impermissibly dilute[d] Negro voting strength." *Id.* at 431 (Powell, J., dissenting). This Court ruled for Mississippi but did not reach the dilution question. *See id.* at 421.

On June 1, 1978, Mississippi's Attorney General submitted a newly enacted apportionment statute to the Attorney General of the United States for preclearance under section 5. On July 31, 1978, Assistant Attorney General for Civil Rights, Drew S. Days, III, objected to the statute, stating that "we have been unable to conclude that the submitted plans for the Mississippi Senate and House of Representatives do not have the purpose or effect of abridging the right to vote because of race or color." Letter from Drew S. Days, III to A. F. Summer at 2 (July 31, 1978), attached as Exhibit 3 to Opposition Memorandum.

Represented by Mr. Leonard, the State of Mississippi filed an action for declaratory relief pursuant to section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. *Mississippi v. United States*, No. 78-1425 (D.D.C. June 1, 1979), *aff'd mem.*, 100 S.Ct. 994 (1980) *(Mississippi I)*. Again the issue was whether the statute in question resulted in the dilution of black electoral strength. *See id.*, slip op. at 4, 5, 8, 10, 11, 14-16, 19, 21-23 & n.6.

On April 12, 1979, Mississippi submitted the legislation which is the subject matter of this suit (Senate Bill 2802) to the Department of Justice for preclearance under section 5 and, in documents then submitted, provided Mr. Leonard's name to the Department of Justice specifying that he was "Counsel for the Legislature." Affidavit of Mississippi's Attorney General William A. Allain at 2 (Allain Affidavit), attached to and incorporated by reference in the Opposition Memorandum.

On June 11, 1979, Assistant Attorney General Days objected to this statute, basing his objection upon the dilution of the electoral strength of black voters and stating: "Under Section 5 an objection is required if the modifications of the electoral system of the State of Mississippi made by Senate Bill 2802 would 'lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.'" Letter from Drew S. Days, III to A. F. Summer at 2 (Jun. 11, 1979), attached as Exhibit 4 to Opposition Memorandum.

On December 27, 1979, the State, with Mr. Leonard and his firm as its counsel, sought de novo review of Senate Bill 2802 in the United States District Court for the District of Columbia pursuant to section 5 of the Voting Rights Act, 42 U.S.C. § 1973. On April 2, 1980, the Government filed its motion to disqualify counsel on the ground that the 1970 and 1979 submissions were the same matter. On September 29, 1980, the three-judge district court disqualified Mr. Leonard and his firm from further participation in this case.

Under the law of Mississippi, different legislatures passed the statutes considered in the 1970 and 1979 submissions. Miss. Const. § 36. Additionally, not only are the 1970 and 1979 enactments different (fewer than half of the provisions of the statutes are even comparable), *see* A Comparative Digest of the 1970 and 1979 Missis-

sippi Open Primary Laws, attached as Exhibit 5 to Opposition Memorandum, but in social, political, and electoral terms, Mississippi itself is different. In 1970, there was one black member of the Mississippi Legislature. Today, there are 17. In 1970, both of Mississippi's United States senators were Democrats. Today, one is a Democrat; the other is a Republican. In 1970, there were 81 black elected officials in Mississippi; by 1979, there were 327, and the state ranked second only to Louisiana. 9 Joint Center for Political Studies, National Roster of Black Elected Officials, Table 1 at x-xi (1979).

REASONS FOR NOTING PROBABLE JURISDICTION

I. THIS COURT HAS UNIQUE APPELLATE JURISDICTION OVER APPEALS FROM STATUTORY THREE-JUDGE FEDERAL DISTRICT COURTS ON ALL ISSUES ARISING PURSUANT TO LITIGATION UNDER THE VOTING RIGHTS ACT OF 1965, AS AMENDED.

This Court must be able to determine the authority of the court below " 'to make such corrective order as may be appropriate to the enforcement of the limitations which that section [of the law in question] imposes.' " *Bailey v. Patterson*, 369 U.S. 31, 34 (1962) (per curiam), *quoting Gully v. Interstate Natural Gas Co.*, 292 U.S. 16, 18 (1934) (per curiam). 42 U.S.C. § 1973c provides for direct review of "*any* appeal" by this Court of any decision by a three-judge district court duly constituted under the provisions of the Voting Rights Act. In *NAACP v. New York*, 413 U.S. 345 (1973), this Court's only prior ruling on the jurisdictional issue presented here,[2] the words "any appeal" were held to require

[2] *NAACP* was brought pursuant to section 4 of the Voting Rights Act, 42 U.S.C. § 1973b. This action is brought pursuant to section 5, 42 U.S.C. § 1973c. The appellate jurisdiction is exactly the

Supreme Court review of the collateral issue of intervenor standing. *Id.* at 354.

Congress sought to have the broad statutory and constitutional principles at issue in Voting Rights Act cases subjected to timely and economical adjudication, *id.*, and district court disqualification orders fall within the language of *NAACP v. New York*, because such orders are "meaningful judicial determination[s] made in the progress of the § 4 lawsuit." *Id.* at 353-54.[3]

Because direct-appeal statutes provide an expedited procedure to ensure speedy resolution of important issues, this Court has held that under certain unique statutes, it has jurisdiction to review direct appeals from three-judge district court orders on grounds short of the merits.[4] To allow an exception to this process would

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same in both sections: "An action . . . shall be heard and determined by a court of three judges . . . and *any appeal shall lie to the Supreme Court.*" 42 U.S.C. §§ 1973b(a), 1973c (emphasis added).

[3] In *NAACP*, the United States "'substantially' agree[d] that this Court has jurisdiction to review on direct appeal the denial of intervention in an action of this kind." 413 U.S. at 353, *quoting* Brief for United States (footnote omitted). Of course, this Court is the ultimate arbiter of its own jurisdiction. 413 U.S. at 353; *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934). As Chief Justice Marshall observed in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821), "It is most true that this court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction if it should."

[4] *See American Trial Lawyers Ass'n v. New Jersey Supreme Court*, 409 U.S. 467 (1973) (per curiam); *Mitchum v. Foster*, 407 U.S. 225 (1972); *Carter v. Stanton*, 405 U.S. 669 (1972) (per curiam); *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972); *Granite Falls State Bank v. Schneider*, 402 U.S. 1006 (1971); *Flast v. Cohen*, 392 U.S. 83 (1968); *Zwickler v. Koota*, 389 U.S. 241 (1967); *Florida Lime & Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73 (1960); *Doud v. Hodge*, 350 U.S. 485 (1956).

nibble away at Congress' clear intent and ultimately allow this Court's jurisdiction to "evaporate." *Hicks v. Miranda*, 422 U.S. 332, 343 (1975).

As this Court noted in contrasting the "any appeal" language of section 1973b(a) of the Voting Rights Act with that of 28 U.S.C. § 1253, the language "any appeal" differs significantly from the language "any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." *NAACP v. New York*, 413 U.S. at 356. Striking differences also are found between § 1973c and 42 U.S.C. § 1971g ("from the final judgment" of the three-judge court); 28 U.S.C. § 1291 ("appeals from all final decisions"), and 28 U.S.C. § 2284 ("any action required to be heard and determined by a district court of three judges").

"The broader language of § 4(a), when viewed in the light of Congress' concern about hastening the resolution of suits involving voting rights, . . . prompts us to conclude that the . . . § 4(a) appeal is directly here and not to the Court of Appeals." *NAACP v. New York*, 413 U.S. at 355 (citation omitted).

Probable jurisdiction, therefore, should be noted.

II. THE COURT SHOULD EXERCISE ITS SUPERVISORY POWER AND ITS APPELLATE JURISDICTION TO HEAR APPEALS OF ORDERS DISQUALIFYING COUNSEL IN ORDER TO SAFEGUARD THE BASIC RIGHT OF LITIGANTS TO COUNSEL OF THEIR CHOICE.

This case falls into "the 'small class of cases' that [*Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949)] has placed beyond the confines of the final-judgment rule." *Abney v. United States*, 431 U.S. 651, 659 (1977). When its standards are met, *Cohen* "allows immediate appeals from certain orders that do not fully

and finally terminate the litigation between the parties." *Community Broadcasting of Boston, Inc. v. FCC*, 546 F.2d 1022, 1024 (D.C.Cir. 1976).[5]

The four *Cohen* standards are met here.

1. The district court's ruling on the matter must not be "tentative, informal or incomplete." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. at 546. Here the disqualification issue has been finally decided.

2. The ruling must be "separable from, and collateral to, rights asserted in the [main] action." *Id.* Here the disqualification ruling is not a step toward final judgment into which that ruling would "merge." It does not "affect, [n]or [is it] . . . affected by, [any] decision of the merits." *Id.* It is so "independent of the cause itself," *id.*, that appellate disposition should await no further action on the main matter. Disqualification of counsel is important, is entirely collateral to the merits, and, if erroneous, is effectively unredressable after final judgment on the merits.

3. The matter under review must present "a serious and unsettled question." *Id.* at 547. There is a conflict among the circuits on the issue of attorney disqualification. *Compare, e.g., Armstrong v. McAlpin*, 625 F.2d 433 (2d Cir. 1980) (en banc), *petition for cert. filed*, 49 U.S.L.W. 3334 (U.S. Sept. 18, 1980) (No. 80-431) (disqualification immediately reviewable) *and Akerly v. Red Barn System, Inc.*, 551 F.2d 539 (3d Cir. 1977) (refusal to disqualify immediately reviewable) *with Community Broadcasting of Boston, Inc. v. FCC*, 546 F.2d 1022 (refusal to disqualify not immediately reviewable).

4. The matter must demonstrate a risk of important loss if present review is not available. The injury to the

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[5] The *Cohen* criteria have been reaffirmed. *See United States v. MacDonald*, 435 U.S. 850 (1978); *Abney v. United States*, 431 U.S. 651 (1977).

aggrieved party must be "too important to be denied review," so that the party is "probably irreparably" damaged. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. at 546. Here the rights of the attorney as well as those of his client will be irreparably lost if review is postponed until final judgment on the merits, for Mississippi must proceed through other counsel,[6] and that satisfies the "irreparable injury" requirement of *Cohen. Armstrong v. McAlpin*, 625 F.2d at 439 n.11.

Absent immediate appeal of the disqualification issue, "it will be too late [after final disposition of the case on the merits] effectively to review the present order and . . . rights . . . will have been lost, probably irreparably."

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[6] It is enough that no further consideration of the order is contemplated by the court below. *In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106, 1118 (7th Cir.), *cert. denied*, 444 U.S. 870 (1979). Nor is the express entry of a final judgment provided for by F.R.Civ.P. 54(b) required. *See, e.g., Swanson v. American Consumer Industries, Inc.*, 517 F.2d 555, 560-61 (7th Cir. 1975). On the disqualification issue, the district court has had its last word, *see Premium Service Corp. v. Sperry & Hutchinson, Co.*, 511 F.2d 225, 228 (9th Cir. 1975), and "nothing else can be done in the court below which would be worth doing." *The Attualita*, 238 F. 909, 910 (4th Cir. 1916). This case "fall[s] in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the [main] action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. at 546. This appeal, therefore, is "not an ingredient of the [main] cause of action and does not require consideration with it." *Id.* at 546-47. Rather, it has reached that point where it is "fairly severable," *Swift & Co. Packers v. Compania Columbiana Del Caribe*, 339 U.S. 684, 689 (1950), so that it may be addressed "without any reference to the substance of the [main] action." *Borden Co.* v. *Sylk*, 410 F.2d 843, 846 (3d Cir. 1969). In essence, this appeal "is an action itself, a separate litigation." Underwood, *Appeals in Federal Practice from Collateral Orders*, 36 Va.L.Rev. 731, 738 (1950).

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. at 546.[7]

The requirement that a significant question of law must be present in order to justify immediate review has been held to mean that the issue be "important" or "too important to be denied review." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978); *Abney v. United States*, 431 U.S. at 658.

One measure of importance is a conflict among the circuits. Five circuits require a *Cohen* analysis of appealability of disqualification motions;[8] five circuits permit interlocutory appeals of *denials* of disqualification;[9] four

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[7] Several courts have recognized that, in cases disqualifying counsel, no effective review could be had on appeal of the case on the merits. *See United States* v. *Deutsch*, 599 F.2d 46, 48 (5th Cir.), *cert. denied*, 444 U.S. 935 (1979) (appointment of counsel for criminal defendant); *Hudak v. Curators of the University of Missouri*, 586 F.2d 105, 106 (8th Cir. 1978), *cert. denied*, 440 U.S. 985 (1979) (appointment of counsel in civil rights case); *Caston v. Sears, Roebuck & Co.*, 556 F.2d 1305, 1308 (5th Cir. 1977) (appointment of counsel under Title VII of the Civil Rights Act).

[8] *See Grinnell Corp. v. Hackett*, 519 F.2d 595, 597-98 & n.4 (1st Cir.), *cert. denied*, 423 U.S. 1033 (1975); *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 496 F.2d 800, 802 (2d Cir. 1974), *overruled on other grounds, Armstrong v. McAlpin*, 625 F.2d 433; *First Wisconsin Mortgage Trust v. First Wisconsin Corp.*, 571 F.2d 390, 393, *rev'd on other grounds*, 584 F.2d 201 (7th Cir. 1978) (en banc); *Van-S-Aviation Corp. v. Piper Aircraft Corp.*, 551 F.2d 213, 217 (8th Cir. 1977); *Jicarilla Apache Tribe v. United States*, 601 F.2d 1116, 1124 (10th Cir.), *cert. denied*, 444 U.S. 995 (1979).

[9] *See Akerly v. Red Barn System, Inc.*, 551 F.2d 539; *Aetna Casualty & Surety Co. v. United States*, 570 F.2d 1197 (4th Cir.), *cert. denied*, 439 U.S. 821 (1978); *Brown & Williamson Tobacco Corp. v. Daniel International Corp.*, 563 F.2d 671 (5th Cir. 1977); *Melamed v. ITT Continental Baking Co.*, 592 F.2d 290 (6th Cir. 1979) (by implication); *New Mexico v. Aamodt*, 537 F.2d 1102 (10th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977).

circuits do not permit such interlocutory appeals;[10] and pending in this Court are two cases arising from denials of disqualification.[11]

The arguments favoring appeals of orders granting disqualification, as in this case, are more compelling than those relating to denials of disqualification. As the Second Circuit observed en banc:

> [i]n such cases, the losing party is immediately separated from counsel of his choice. If the order is erroneous, correcting it by an appeal at the end of the case might well require a party to show that he lost the case because he was improperly forced to change counsel. This would appear to be an almost insurmountable burden. In addition, permitting an immediate appeal from the grant of a disqualification motion does not disrupt the litigation, since the trial must be stayed in any case while new counsel is obtained. Moreover, the grant of a disqualification motion may effectively terminate the litigation if the party whose counsel is disqualified cannot afford to hire new counsel to begin the litigation anew. . . . Furthermore, the granting of a disqualification motion by a district judge is a fair indication that a nonfrivolous issue has been raised; there is no similar assurance that appeals from denials of disqualification motions will raise a substantial question. Thus, it is far less likely that appeals from orders granting disqualification motions will be taken purely for tactical reasons. Finally, disqualification often im-

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[10] *See Armstrong v. McAlpin*, 625 F.2d 433; *Firestone Tire & Rubber Co. v. Risjord*, 612 F.2d 377 (8th Cir.), *cert. granted*, 100 S.Ct. 2150 (1980); *Chugach Electric Ass'n v. United States District Court for the District of Alaska*, 370 F.2d 441 (9th Cir. 1966), *cert. denied*, 389 U.S. 863 (1967); *Community Broadcasting of Boston, Inc. v. FCC*, 546 F.2d 1022.

[11] *Firestone Tire & Rubber Co. v. Risjord*, 100 S.Ct. 2150; *Armstrong v. McAlpin*, 49 U.S.L.W. 3334.

> pairs the reputation of the disqualified firm or attorney, and this injury may never be corrected on appeal if the party is satisfied with the performance of his new counsel.

Armstrong v. McAlpin, 625 F.2d at 440-41.

"[G]rants of disqualification motions . . . should therefore be immediately appealable as a matter of right." *Id.* at 441.

III. DISQUALIFICATION WAS IMPROPER BECAUSE THE 1970 AND 1979 SUBMISSIONS INVOLVE DIFFERENT MATTERS AND, EVEN IF THE SAME, THE GOVERNMENT WAIVED ITS RIGHT TO SEEK DISQUALIFICATION.

"[A]t least a modest initial exploration of the merits of the collateral issue itself" should be made here, 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3911, at 494 (1976), because "the importance of the controversy cannot be decided in a vacuum." *United States v. Perkins*, 433 F.2d 1182, 1186 (D.C.Cir. 1970). The district court concluded that Mr. Leonard "participated personally and substantially in the matter before the Court while he was employed by the Department of Justice," and that "DR 9-101(B) [of the ABA Code of Professional Responsibility] preclude[d] further participation in this action by Leonard or any member of his law firm."

The Government contended and the lower court apparently agreed that, because of a prior section 5 "non-action" [12] involving the State's 1970 submission during

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[12] Acting on behalf of the Attorney General, Mr. Leonard neither approved nor disapproved of the State's 1970 submission. Exhibit 1 to Opposition Memorandum at 3 ("I want to make clear that no inference of approval or disapproval is to be drawn from the failure of the Attorney General to object . . . .").

his tenure as Assistant Attorney General for Civil Rights, Mr. Leonard's representation of the State in its efforts to obtain approval of the 1979 submission contravenes Canon 9 of the Code of Professional Responsibility of the American Bar Association (ABA Code). But the statutes involved in the 1970 and 1979 submissions are different, were enacted by different legislatures, and were signed by different governors during socially and politically different times.[13]

As in many other section 5 cases, the 1970 and 1979 submissions, as well as the statutes in question in *Connor v. Finch*, 431 U.S. 407, and *Mississippi I*,[14] while different, did present a common *legal* issue—whether the dilution of black voting strength is statutorily permissible.

When Mississippi resubmitted precisely the same acts that were the subject of the 1970 submission (House Bills 362 and 363) to the Department of Justice in 1974, the then Assistant Attorney General for Civil Rights, J. Stan-

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[13] Even Assistant Attorney General Days, one of the attorneys that represented the Government in the lower court, has noted the changes that have occurred in the State.

> Q. Do you agree that things have changed dramatically for the better since 1963-64 compared to what it is today?
>
> A. Yes, I think there have been substantial improvements.

Deposition of Drew S. Days, III at 70, *Mississippi I*.

[14] Dilution was *the* issue in *Connor v. Finch* and in *Mississippi I*. *See, e.g.*, 431 U.S. at 409, 422-26; No. 78-1425, slip op. at 4-5, 8, 10-11, 14-16, 19, 21-23 & n.6. Indeed, Justice Powell, dissenting in *Connor v. Finch*, noted: "The issue primarily presented and argued in these appeals is whether the District Court plan impermissibly dilutes Negro voting strength." 431 U.S. at 431. *Compare* Exhibit 4 to Opposition Memorandum at 2. There "retrogression" is the euphemism for "dilution": "Under Section 5 an objection is required if the modifications of the electoral system of the State of Mississippi made by Senate Bill 2802 would 'lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.'" *Id.*

ley Pottinger, characterized the 1970 submission as the "prior *similar* proposals," Exhibit 2 to Opposition Memorandum at 2, and found that *Evers v. State Board of Election Commissioners*, 327 F.Supp. 640 (S.D.Miss. 1971), *appeal dismissed*, 405 U.S. 1001 (1972), "*foreclosed*" any further action on the 1970 submission. Exhibit 2 to Opposition Memorandum at 2. Now, "as nimbly as if dancing a quadrille," *Orloff v. Willoughby*, 345 U.S. 83, 87 (1953), the Government resurrects the 1970 submission to disqualify Mississippi's counsel of choice.

Yet, at least one court has warned that "[l]eveling the charge of impropriety at opposing counsel, which if sustained would require withdrawal, should not be a standard part of counsel's offensive armament to be used routinely or without reasonable and good faith belief in its necessity." [15] This is especially true when the litigant

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[15] *First Wisconsin Mortgage Trust v. First Wisconsin Corp.*, 584 F.2d at 206. To arbitrarily disqualify Mr. Leonard and his firm would be to "interfere needlessly with the right of litigants to obtain competent counsel of their choosing, particularly in specialized areas requiring special, technical training and experience," which the ABA was concerned about safeguarding, rather than vitiating, under DR 9-101(B). ABA Formal Opinion 342 at 5.

In a disqualification case, involving a former government employee, the court must balance "the client's right to counsel of his choice, the lawyer's right freely to practice his profession, and the government's need to attract skilled lawyers." *Woods v. Covington County Bank*, 537 F.2d 804, 812 (5th Cir. 1976). As the Second Circuit has noted:

> An overly strict approach to disqualification of the former government attorney and especially to disqualification of his firm impairs the client's choice of counsel and can impair the government's ability to attract non-career attorneys, if they come to believe that their post-government employment opportunities will be unduly restricted. These considerations themselves implicate ethical values concerning the availability of professional services.

Armstrong v. McAlpin, 606 F.2d 28, 32 (1979), *rev'd on other grounds*, 625 F.2d 433.

is the Government for its efforts to affect the selection of opposing counsel, if any, should be based upon compelling law and facts. However, the Government was "not . . . able to find a judicial or administrative precedent under § 207(a) that presents facts similar to those here." Memorandum by Leon Ulman for Drew S. Days, III (Mar. 4, 1980).

A. Disqualification Under DR 9-101(B) Was Improper Because The 1970 Matter Was Different From That Which Is At Issue In The Present Litigation.

In 1970, while Mr. Leonard served as Assistant Attorney General for Civil Rights, Mississippi, pursuant to section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, sought preclearance of House Bills 362 and 363 for changes in the electoral system. The Government contended that this "initial" submission was "virtually identical" to the legislation at issue in this case, and that because of this "virtual" identity, Mr. Leonard should be disqualified. Motion for Order Disqualifying Counsel at 1. The 1979 open primary bill is not, however, the same statute nor does it call into question the same factual issues as the 1970 submission. It was passed by a different legislature, in a state that has changed socially, politically, demographically, and economically since 1970, when the legislation considered by Mr. Leonard was submitted.[16]

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[16] Times (and places and minds) do change. For example, the Government in *Mississippi I* recognized the significance of the passage of time.

> While census figures are a useful index in considering whether a reapportionment plan dilutes black voting strength, such data should not be used to the exclusion of other factors, especially where, as here, eight years have elapsed since the 1970 census was taken and factors such as population shifts which have occurred since 1970, the size of the district, as well as the relative political abilities of the black or white voters included

Canon 9, on which the district court based its disqualification order,[17] counsels the attorney to "avoid even the appearance of professional impropriety." Disciplinary Rule 9-101(B) states that "[a] lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee." The ABA's interpretation of "matter" is important when considering whether the "matter" before this Court is the same as the "matter" before Mr. Leonard while he was an Assistant Attorney General.

> Although a precise definition of "matter" as used in the Disciplinary Rule is difficult to formulate, the term seems to contemplate a discrete and isolatable transaction or set of transactions between identifiable parties. Perhaps the scope of the term "matter" may be indicated by examples. The same lawsuit or litigation is the same matter. The same issue of fact involving the same parties and the same situation or conduct is the same matter. By contrast, *work as a government employee in* drafting, *enforcing or interpreting government* or agency procedures, regulations, or *laws*, or in briefing abstract principles of law, *does not disqualify the lawyer under DR 9-101(B) from subsequent private employment involving the same* regulations, procedures, or *points*

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in the district are all critical in considering whether the reapportionment "designedly or otherwise" dilutes black voting strength.

Defendant's Proposed Findings of Fact and Conclusions of Law ¶ 27, at 22-23, *Mississippi I*, attached as Exhibit 6 to Opposition Memorandum; *see Control Data Corp. v. IBM Corp.*, 318 F.Supp. 145, 147 (D.Minn.), *aff'd*, 430 F.2d 1277 (8th Cir. 1970) (passage of 15 years has changed focus of industry from tabulation to computers, making prior government action in current private antitrust suits against the same defendant different matters).

[17] The Government also sought disqualification under Department of Justice Standards of Conduct, 28 C.F.R. § 45.735-7(a) (1979), and Canon 4 of the ABA Code.

> *of law*; the same "matter" is not involved because there is lacking the discrete, identifiable transactions or conduct involving a particular situation and specific parties.

ABA Formal Opinion 342 at 6 (emphasis added).

The purpose of DR 9-101(B), as interpreted by the Second Circuit and the ABA's Committee on Professional Ethics, is

> "[to avoid] the manifest possibility that . . . [a former Government lawyer's] action as a public legal official might be influenced (or open to the charge that it had been influenced) by the hope of later being employed privately to *uphold or upset* what he had done."

General Motors Corp. v. New York, 501 F.2d 639, 649 (2d Cir. 1974), *quoting* ABA Comm. on Professional Ethics, Opinions, No. 37, at 124 (1931) (emphasis added). Here, however, Mr. Leonard neither approved nor disapproved of Mississippi's 1970 submission and there is nothing—no prior opinion—for him to "uphold or upset."

Beyond that, the ABA has cautioned against disqualification based upon a literal reading of Canon 9 stating that it is "too vague . . . to be useful." Formal Opinion 342 at 5 n.17; *see Westinghouse Electric Corp. v. Rio Algom, Ltd.*, 448 F.Supp. 1284, 1304 (N.D.Ill.), *modified*, 580 F.2d 1311, *rev'd on other grounds*, 588 F.2d 221 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978). Similarly, the Canon and accompanying Disciplinary Rules should not become "a convenient tool for disqualification when the facts simply do not fit within the rubric of other specific ethical and disciplinary rules." *International Electronics Corp. v. Flanzer*, 527 F.2d 1288, 1295 (2d Cir. 1975). "[W]hen there is no claim that the trial will be tainted, appearance of impropriety is simply too slender a reed on which to rest a disqualification order except in the rarest cases." *Board of Education v. Nyquist*, 590 F.2d 1241,

1247 (2d Cir. 1979); *Society for Good Will to Retarded Children, Inc. v. Carey*, 466 F.Supp. 722, 725 (E.D.N.Y. 1979). "[A]bsent a threat of taint to the trial, . . . possible ethical violations are generally better addressed by the 'comprehensive disciplinary machinery' of the state and federal bar." *Armstrong v. McAlpin*, 625 F.2d at 446, *quoting Board of Education v. Nyquist*, 590 F.2d at 1246.[18]

Most importantly, there can be no taint, or appearance of it, arising from Mr. Leonard's conduct because confidentiality and secrecy were not and are not involved.[19]

The district court ordered that documents relating to the 1970 submission be produced as is proper in a section 5 proceeding. The policy of open government, *see NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 220-21 (1978); Freedom of Information Act, 5 U.S.C. § 552; Government in Sunshine Act, 5 U.S.C. § 552b, is all important when the Government seeks to enforce section 5 of the Voting Rights Act against a state.[20]

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[18] The en banc court noted in *Armstrong* that the Reporter for the ABA committee that drafted the ABA Code had recently written that the Code's Disciplinary Rules "were drafted for use in disciplinary proceedings and were not intended to be used as rules governing disqualification motions." *Armstrong v. McAlpin*, 625 F.2d at 446 n.26, *citing* Sutton, *How Vulnerable Is the Code of Professional Responsibility?*, 57 N.C.L. Rev. 497, 514-16 (1979).

[19] There is no evidence, nor is there even a direct allegation, of Mr. Leonard's access to any secrets or confidences. Disqualification should not be permitted "based upon speculation or suspicion that confidential information may have been obtained during the course of a . . . lawyer's association" with his former employer. *Redd v. Shell Oil Co.*, [1974-2] Trade Cas. ¶ 75,392, at 98,278 (D.Utah 1974), *rev'd on other grounds*, 518 F.2d 311 (10th Cir. 1975); *see Bonus Oil Co. v. American Petrofina Co.*, [1975-1] Trade Cas. ¶ 60,315, at 66,266-67 (D.Neb. 1975).

[20] The Act is an anomaly in our political process which the Supreme Court has characterized as both "unusual" and "severe." *Morris v. Gressette*, 432 U.S. 491, 501 (1977), *citing Allen v. State*

B. Even If The 1970 And 1979 Submissions Involve The Same Matter, The Government Waived Its Right To Disqualification.

The Government knew by 1976, at the latest, that Mr. Leonard represented Mississippi *in this "matter."* The Government noted in its Reply Brief in *Mississippi I* that one of the issues in that case "dates back at least to the time when plaintiff's present counsel, Mr. Jerris Leonard, was the Assistant Attorney General for Civil Rights." Reply Brief for the United States at 8 n.7, *Mississippi I*, attached as Exhibit 7 to Opposition Memorandum. Yet, although the same "matter"—vote dilution—involved in the 1970 submission, in *Mississippi I*, and in this case was at issue, the Government did not challenge Mr. Leonard's qualification.[21] It never challenged Mr. Leonard's qualification in either *Mississippi I* or in *Connor v. Finch*.[22]

Additionally, on the day (April 12, 1979) of the submission that is the subject matter of this case, the Government knew that Mr. Leonard was "counsel for the legislature." Allain Affidavit at 2. Over a year ago, on June 11, 1979, Assistant Attorney General Days inter-

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Board of Elections, 393 U.S. 544, 556 (1969). It infringes upon each affected state's "separate and independent existence." *National League of Cities* v. *Usery*, 426 U.S. 833, 851 (1976), *quoting Coyle v. Smith*, 221 U.S. 559, 580 (1911).

[21] The Government first presented its reasons for seeking Mr. Leonard's disqualification to Mr. Leonard on March 6, 1980. Memorandum in Support of United States' Motion for Order Disqualifying Counsel at 1 n.1. Even this is almost one year after the Department of Justice had notice that Mr. Leonard represented the State regarding the statute now before the district court in this case.

[22] The Government was an intervenor in *Connor v. Finch*, 431 U.S. 407. Because the same parties and the same "dilution" issue in this case were also present in *Connor*, the Government, if it had an objection, should have objected in *Connor*.

posed an objection to the implementation of the 1979 open primary bill in Mississippi. At no point in that letter did Assistant Attorney General Days raise any objection to Mr. Leonard's representation of the State in this "matter." *See* Exhibit 4 to Opposition Memorandum. It was only after Mr. Leonard, acting as special counsel for the State, filed the present lawsuit on December 27, 1979, and after Mississippi, represented by Mr. Leonard had been successful in *Mississippi I* (on June 1, 1979), that the Department of Justice decided to seek Mr. Leonard's disqualification.

In *Mississippi I*, "matters" common to this case which pertain to the implementation of the 1979 legislation were litigated, especially the dilution of black voting strength [23] and the electability of black candidates,[24] bloc voting,[25] the history of racial discrimination in Mississippi,[26] impediments to the electoral process,[27] the openness of the political system,[28] and a myriad of other related issues.

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[23] *Compare* Brief for the United States at 29, *Mississippi I*, attached as Exhibit 8 to Opposition Memorandum *and* Defendants-Intervenors' Proposed Findings of Fact and Conclusions of Law at 3, *Mississippi I*, attached as Exhibit 9 to Opposition Memorandum, *with* Memorandum of Law (unidentified but provided in response to Mr. Leonard's Motion to Compel Production of Documents) at 1, attached as Exhibit 10 to Opposition Memorandum.

[24] *Compare* Exhibit 8 to Opposition Memorandum at 13-14 *with* Memorandum from Gerald W. Jones to Jerris Leonard at 5-6 (Sept. 15, 1970), attached as Exhibit 11 to Opposition Memorandum.

[25] *Compare* Exhibit 8 to Opposition Memorandum at 12 *with* Exhibit 11 to Opposition Memorandum at 5.

[26] *Compare* Exhibit 8 to Opposition Memorandum at 1-3 *with* Memorandum from Jim Turner to Mr. Leonard at 1-3 (Sept. 17, 1970), attached as Exhibit 12 to Opposition Memorandum.

[27] *Compare* Exhibit 8 to Opposition Memorandum at 13-14 *with* Exhibit 11 to Opposition Memorandum at 8.

[28] *Compare* Exhibit 7 to Opposition Memorandum at 12-16 *with* Exhibit 12 to Opposition Memorandum at 2-3.

A motion to disqualify "should be made with promptness and reasonable diligence once the facts are known." *Milone v. English*, 306 F.2d 814, 818 (D.C.Cir. 1962); *see Marco v. Dulles*, 169 *F.Supp.* 622, 632 (S.D.N.Y. 1959) ("A party making . . . a motion [to disqualify] should do so with reasonable diligence and promptness after the facts have become known to it."). "This knowing inaction and calculated lying in wait, taken with the hope of upsetting a future adverse decision of the Commission, constituted a waiver of appellant's rights." *International Paper Co. v. FPC*, 438 F.2d 1349, 1357 (2d Cir.), *cert. denied*, 404 U.S. 827 (1971).

In this case, the span of time is great—10 years—and the present case does not, as discussed in Section A above, concern the same matter as dealt with by Mr. Leonard during his tenure at the Department of Justice a decade ago. Even if it did, however, the Department of Justice did not act with "reasonable diligence" in seeking Mr. Leonard's disqualification. This Court should note probable jurisdiction to decide among other questions whether the Government, having slept on its rights, can thereafter expose a litigant to the costs and hardships of counsel disqualification.[29]

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[29] As an intended consequence of disqualification, the cost and hardship to the State will be substantial. *See* Allain Affidavit at 3.

As an unintended consequence of disqualification, a precedent has been established, that, if followed, could deprive the civil rights movement, now and in the future, of some of its most knowledgeable and experienced attorneys.

> Many a lawyer who has served with the government has an advantage when he enters private practice because he has acquired a working knowledge of the department in which he is employed, has learned the procedures, the governing substantive and statutory law and is to a greater or lesser degree an expert in the field in which he was engaged.

ABA Formal Opinion 342 at 6 n.21; *see Kesselhart v. United States*, 555 F.2d 791, 793 (Ct.Cl. 1977) ("Attorneys having both private

and Government experience are often better qualified to be of value to courts, as their officers, and to their clients, public and private, than those having one or the other experience alone."). This is certainly true for Assistant Attorneys General for the Civil Rights Division—past and present. For example, civil rights legal organizations are routinely involved in the litigation of matters in which the Department of Justice has been involved. These organizations have as members of their boards and as their past chairmen at least three former Assistant Attorneys General for Civil Rights.

The Government's attempt to disqualify Mr. Leonard's entire firm may have another substantial, perhaps unforeseen, effect. "An overly strict approach to disqualification of the former government attorney and especially to disqualification of his firm impairs the client's choice of counsel and can impair the government's ability to attract non-career attorneys." *Armstrong v. McAlpin*, 606 F.2d at 32.

> If service with the government will tend to sterilize an attorney in too large an area of law for too long a time, or will prevent him from engaging in practice of the very speciality for which the government sought his service—and if that sterilization will spread to the firm with which he becomes associated—the sacrifices of entering government service will be too great for most men to make. As for those men willing to make these sacrifices, not only will they and their firms suffer a restricted practice thereafter, but clients will find it difficult to obtain counsel, particularly in those specialties and suits dealing with the government .

United States v. Standard Oil Co. (New Jersey), 136 F.Supp. 345, 363 (S.D.N.Y. 1955) (footnote omitted) ; *see* Kaufman, *The Former Government Attorney and the Canons of Professional Ethics*, 70 Harv. L. Rev. 657, 668 (1957).

To avoid an attack upon him, and injury to his client and his law firm, the erection of a "Chinese Wall" to screen Mr. Leonard from further participation in this litigation was proposed. "Virtually all of the ethical problems that occasion the imputed disqualification of the firm will be solved by adequate screening. Nor should there remain an 'appearance' of impropriety, since the relevant kind of appearance is one that a reasonable person, informed of the facts, would suspect." Lacovara, *Restricting the Private Practice of Former Government Lawyers*, 20 Ariz. L. Rev. 369, 399 (1978).

CONCLUSION

For the foregoing reasons this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

/s/ Charles Morgan, Jr.

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Dated: January 14, 1981

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of January, 1981, I caused three copies of Appellant's Jurisdictional Statement to be deposited in the mail, first-class postage prepaid, to:

Solicitor General
Department of Justice
Washington, D.C. 20530

/s/ Edward Ashworth
EDWARD ASHWORTH

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action 79-3469

STATE OF MISSISSIPPI,

Plaintiff

v.

UNITED STATES OF AMERICA and
BENJAMIN R. CIVILETTI,

Defendants

MEMORANDUM OPINION

Before the Court is Defendants' Motion to Disqualify Counsel Jerris Leonard in the above captioned Voting Rights Act litigation. The facts may be summarized as follows:

In 1970 Mississippi attempted to enact an "open primary" voting system. In this system, all voters would select the candidates for the general election in one primary. If a candidate received a majority of the votes in the primary, only his or her name would appear on the ballot in the general election. If no majority was attained, only the two candidates receiving the greatest number of votes would be placed on the ballot.

Mississippi's 1970 legislation was submitted to the Justice Department for preclearance pursuant to Section 5 of the Voting Rights Act. The Assistant Attorney General in charge of the Civil Rights Division, Jerris Leonard, although charged with Section 5 preclearance responsibility, refused to object to or approve the open primary legislation. Subsequently, suit was brought in

Mississippi to enjoin the state from employing the open primary system. *Evers v. State Bd. of Election Comm.*, 327 F.Supp. 640 (S.D. Miss. 1971). That Court held that until either the Attorney General of the United States or the United States District Court for the District of Columbia approved the open primary system, it could not be effectuated. Mississippi's appeal to the Supreme Court was dismissed for procedural reasons.

In 1971 Leonard left the Justice Department. In 1974 Mississippi re-submitted the open primary plan to the Department of Justice. Assistant Attorney General Pottinger denied Section 5 preclearance. A new open primary plan was submitted to the Attorney General in 1979, and has been rejected by the Justice Department. Mississippi then commenced this litigation, seeking Section 5 preclearance of the new open primary legislation.

Former Justice Department Attorney Jerris Leonard is currently retained by the State of Mississippi to represent the State in this action. The Justice Department contends that it is unethical for Leonard to represent Mississippi because of his participation in the Department's review of the 1970 open primary legislation. It has therefore moved to disqualify Leonard and his law firm from further participation in the instant case.

Canon 9 of the Code of Professional Responsibility states that "[a] lawyer should avoid even the appearance of professional impropriety." Disciplinary Rule 9-101(B) provides that "[a] lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee." To apply DR 9-101(B) to litigation before it, the Court must address the relationship between the attorney whose conduct is questioned, his opponent, and the cause of action before the Court. If the attorney was formerly employed by his opponent, and the litigation consists of a matter in which that attorney participated personally and substantially.

then the appearance of impropriety is manifest. Thus, three questions of fact must be addressed in the instant case, to wit: (1) was Leonard formerly employed by the Department of Justice; (2) did he participate personally and substantially in the Department's review of the 1970 open primary legislation; and (3) is the 1970 legislation the same "matter" as the 1979 open primary legislation before the Court?

It is uncontroverted that Leonard was employed by the Justice Department in 1970. It is also uncontroverted that Leonard was delegated the responsibility of scrutinizing the 1970 open primary legislation for possible Section 5 violations. While there may be occasions where responsibility *qua* responsibility does not reflect personal and substantial participation, this litigation is not such an instance. Leonard not only made the decision not to object to or approve the 1970 legislation, he also rejected the recommendation of his aides in arriving at his decision. It is clear from the documentation presented to the Court that Leonard was intimately involved in the Department's review of the 1970 open primary legislation.

To ascertain whether the 1979 and 1970 Acts are the same matter for DR 9-101(B) analysis, the Court must compare those Acts in the context of this litigation. The Justice Department denied—and Plaintiff is seeking—preclearance pursuant to Section 5 of the Voting Rights Act. The major impediment to such preclearance is the attempted implementation of an open primary system. The primary purpose of both Acts is the implementation of such a system, and the ultimate resolution of this case is contingent upon our analysis of this system. While Plaintiff has cited numerous differences between the two Acts, these differences involve mere technicalities that have thus far gone unchallenged by the Justice Department. These dissimilarities cannot obscure the major purpose of both Acts—to institute an open primary sys-

tem in Mississippi. In the attempted effectuation of this purpose, the Acts are identical. Because the Acts are identical in this respect, and because the open primary system must be scrutinized in light of Section 5, the two Acts must be considered the same matter for DR 9-101(B) analysis.

It is thus apparent that Jerris Leonard participated personally and substantially in the matter before the Court while he was employed by the Department of Justice. DR 9-101(B) therefore precludes further participation in this action by Leonard or any member of his law firm. An appropriate Order follows this Opinion.

/s/ Carl McGowan
CARL MCGOWAN
United States Circuit Judge

/s/ Aubrey E. Robinson, Jr.
AUBREY E. ROBINSON, JR.
United States District Judge

/s/ John Garrett Penn
JOHN GARRETT PENN
United States District Judge

DATE: September 29, 1980

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action 79-3469

STATE OF MISSISSIPPI,
Plaintiff

v.

UNITED STATES OF AMERICA and
BENJAMIN R. CIVILETTI,
Defendants

ORDER

Upon consideration of Defendants' Motion to Disqualify Counsel, the Opposition thereto, the entire record herein and the Memorandum Opinion filed this date, it is by the Court this 29th day of September, 1980,

ORDERED, that neither Jerris Leonard nor any member of his law firm may represent the State of Mississippi in this litigation.

/s/ Carl McGowan
CARL MCGOWAN
United States Circuit Judge

/s/ Aubrey E. Robinson, Jr.
AUBREY E. ROBINSON, JR.
United States District Judge

/s/ John Garrett Penn
JOHN GARRETT PENN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-3469

STATE OF MISSISSIPPI,
Plaintiff

v.

UNITED STATES OF AMERICA and
BENJAMIN R. CIVILETTI,
Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that The State of Mississippi, the plaintiff above named, hereby appeals to the Supreme Court of the United States from the final order disqualifying its counsel, entered in this action on September 29, 1980.

This appeal is taken pursuant to 28 U.S.C. § 1253.

/s/ Ronald A. Goodbread
RONALD A. GOODBREAD, ESQUIRE
Special Counsel for the
State of Mississippi

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DATE: October 28, 1980

CERTIFICATE OF SERVICE

This is to certify, that I have this day mailed, postage pre-paid a copy of the attached notice of appeal to the Supreme Court of the United States to:

Paul F. Hancock, Esquire
Civil Rights Division
Department of Justice
Washington, D.C. 20530

October 28, 1980

/s/ Ronald A. Goodbread
RONALD A. GOODBREAD

Office-Supreme Court, U.S.
FILED
MAR 27 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1183

In the Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF MISSISSIPPI, APPELLANT

v.

WILLIAM FRENCH SMITH, ATTORNEY GENERAL, and UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

WADE H. MCCREE, JR.
Solicitor General

JAMES P. TURNER
Acting Assistant Attorney General

JESSICA DUNSAY SILVER
MARK L. GROSS
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QUESTION PRESENTED

Whether the district court properly disqualified appellant's counsel because of his substantial involvement in this matter during his service as a government attorney.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1183

STATE OF MISSISSIPPI, APPELLANT

v.

WILLIAM FRENCH SMITH, ATTORNEY GENERAL, and UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

Under this Court's Rule 16, the Attorney General and the United States move to affirm the disqualification order of the district court.

OPINION BELOW

The opinion of the district court (J.S. App. A-1 to A-4) is not reported.

JURISDICTION

The order of the district court was entered on September 29, 1980. The notice of appeal was filed on

October 28, 1980. The appeal was docketed on January 14, 1981. The jurisdiction of this Court is invoked under 42 U.S.C. 1973c. For further discussion of the jurisdictional questions presented by this appeal, see note 2, *infra*.

STATEMENT

In December 1979, the State of Mississippi filed this suit in the United States District Court for the District of Columbia, seeking a declaratory judgment under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, that a change in voting practices, recently enacted by the Mississippi legislature, does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. The defendants in the case, the United States and the Attorney General, moved to disqualify Mississippi's attorney, Jerris Leonard, because of his substantial involvement, during his tenure as Assistant Attorney General for the Civil Rights Division of the Department of Justice, in reviewing an identical change in voting practices enacted by the Mississippi legislature in 1970. The three-judge district court granted the government's motion (J.S. App. A-1 to A-4), and Mississippi appealed directly to this Court.

1. Under current Mississippi law, the same law that has governed Mississippi elections for the last 75 years, candidates for public office may qualify to run in the general election either by winning a party primary or as independents. In 1970, the Mississippi legislature enacted bills that would have replaced this system with a so-called "open primary" method of selecting candidates for the general election. See House Bills 362 and 363 (approved April 6, 1970).

Under the new law, all candidates for an office would run in a single primary. If one candidate received a majority of the vote, his name would be the only one placed on the ballot for the general election. If no candidate received a majority of the primary vote, the two candidates who received the highest number of votes would run against each other in the general election.

Because Mississippi is subject to Section 5 of the Voting Rights Act, and because the 1970 "open primary" law undisputedly would have effected a change in a "standard, practice, or procedure with respect to voting," the State submitted House Bills 362 and 363 to the Attorney General for "preclearance" under Section 5. Jerris Leonard, Mississippi's counsel in the present litigation, was then Assistant Attorney General for the Civil Rights Division of the Department of Justice. In that capacity, he reviewed Mississippi's submission under Section 5, pursuant to a delegation of authority from the Attorney General. See 28 C.F.R. 0.50. Leonard concluded that he could not make a final decision regarding preclearance within the 60-day period provided by the Voting Rights Act (U.S. Exh. S). Subsequently, in response to a challenge to the implementation of House Bills 362 and 363, the United States District Court for the Southern District of Mississippi held that the laws had not been precleared in accordance with Section 5 and therefore could not be enforced. *Evers* v. *State Board of Election Commissioners*, 327 F. Supp. 640 (1971), appeal dismissed, 405 U.S. 1001 (1972).

In 1979, the Mississippi legislature again attempted to substitute an open primary system for the existing method of selecting candidates for general elections in the State. The legislature enacted Senate Bill 2802,

which provided for an open primary system indistinguishable from the one that would have been created by House Bills 362 and 363 nine years earlier. Mississippi submitted the new law to the Attorney General for preclearance in accordance with Section 5 of the Voting Rights Act. In June 1979, Assistant Attorney General Drew S. Days, III, interposed a timely objection on the ground that the open primary system would " 'lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.' " U.S. Exh. JJ, quoting *Beer* v. *United States*, 425 U.S. 130, 141 (1976). Thereafter, Mississippi filed this lawsuit.

2. The government moved to disqualify Leonard and his firm from representing the State, on the ground that Mississippi's 1970 submission to the Attorney General involved the same proposed change in voting procedures as Senate Bill 2802 and that therefore counsel's substantial involvement in reviewing the 1970 submission in his capacity as Assistant Attorney General precluded him from acting as an attorney for the State in this matter. After a hearing, the district court granted the government's motion (J.S. App. A-1 to A-5). The court observed that, under Canon 9 of the American Bar Association's Code of Professional Responsibility, lawyers "should avoid even the appearance of professional impropriety." In addition, the court pointed to Disciplinary Rule 9-101(B) of the ABA's Code, which states that "[a] lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee" (J.S. App. A-2). The court found that, as Assistant Attorney General, Leonard had been "intimately involved" in the Justice Department's review of Mississippi's 1970 submission

under Section 5 of the Voting Rights Act (J.S. App. A-3). Because the 1970 and 1979 state statutes were both designed to substitute the same open primary system for the existing party primary system, the court held that the state laws "must be considered the same matter" for purposes of the government's disqualification motion (*id.* at A-3 to A-4). Accordingly, the court disqualified Leonard and the members of his firm from representing Mississippi in this litigation.

ARGUMENT

Under 18 U.S.C. 207(a), a former government attorney who, in the course of his government employment, "participated personally and substantially" in any controversy, investigation, judicial proceeding, ruling request, or "other particular matter" is thereafter prohibited from representing any other party in connection with that matter. Similar prohibitions are contained in Justice Department regulations. 28 C.F.R. 45.735-7; 45 Fed. Reg. 7409 (1980) (to be codified at 28 C.F.R. 45.737.5). Disciplinary Rule 9-101(B) of the ABA's Code of Professional Responsibility imposes a like restriction on former government attorneys. The United States District Court for the District of Columbia has adopted this Rule as part of its Code of Professional Responsibility. See Local Rule 4-3(IV)(b), adopting the Code previously adopted by the District of Columbia Court of Appeals, which is the ABA Code with certain amendments, none of which involve Rule 9-101(B).

Presumably because the conflict-of-interest standards thus set forth in statute, regulations, and professional code are consistent and well known, the disagreement between the parties in this litigation is narrow. Mississippi does not challenge the district court's power to disqualify a former government at-

torney from representing a client in a "matter" in which he had "substantial responsibility" when employed by the government. Nor does the State take issue with the court's finding that counsel participated personally and substantially in the Justice Department's review of the 1970 legislation that would have established an open primary system in Mississippi.[1] Rather, the primary focus of the State's attack is the district court's conclusion that the 1979 law, which concededly would establish the identical open primary system, is the same "matter" as the 1970 legislation, for purposes of the court's ruling on the government's disqualification motion. The district court's decision in this regard is clearly correct, does not conflict with any other federal court's interpretation of the phrase "particular matter" as used in 18 U.S.C. 207 and Justice Department regulations, and turns entirely on the unusual factual sequence presented here. Further briefing and argument would not provide additional illumination on the similarity of the 1970 and 1979 state legislation, and, accordingly, we believe that summary affirmance of the district court's disqualification order is the appropriate disposition of Mississippi's appeal.[2]

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[1] Mississippi could hardly question this finding, in light of the evidence in the record showing that, as Assistant Attorney General, Leonard rejected his staff's recommendation to interpose an objection to the 1970 legislation and instead responded to the State's submission by saying that he could not make any determination regarding the validity of the proposed voting changes within the 60-day period allowed by Section 5 of the Voting Rights Act. Compare U.S. Exhs. M, O, and Q with U.S. Exh. S.

[2] We agree that the Court has jurisdiction over the appeal. We think, first, that the disqualification order should be immediately appealable to some court under the "collateral

The district court ruled that Mississippi's 1970 and 1979 submissions to the Attorney General in-

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order" doctrine enunciated in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). If Mississippi cannot appeal now, there is a significant probability that appellate review of the disqualification question will never be available. Assuming that Mississippi is unsuccessful in its suit under Section 5 of the Voting Rights Act, it is highly unlikely that this Court would reverse the three-judge district court's holding on the merits and remand for new proceedings, solely on the ground that the State should have been permitted to retain Leonard as its counsel. (In this regard, the disqualification order here may be different from a similar order entered against a defendant in a criminal case. If a defendant's attorney is improperly disqualified and the defendant is subsequently convicted, reversal of the conviction and remand for a new trial may be sufficient to protect the defendant's interest in being represented by the counsel of his choice. The potential distinctions between criminal cases and other litigation in connection with attorney disqualification issues are discussed at greater length in the Brief for the United States as Amicus Curiae in *Firestone Tire & Rubber Company* v. *Risjord*, No. 79-1420 (Jan. 13, 1981), at 13-18, 25-26.) At least in civil cases, the courts of appeals agree that orders granting motions to disqualify counsel are immediately appealable. See, *e.g.*, *Armstrong* v. *McAlpin*, 625 F.2d 433 (2d Cir. 1980) (en banc), vacated and remanded on other grounds, No. 80-431 (Jan. 19, 1981); *General Electric Co.* v. *Valeron Corp.*, 608 F.2d 265 (6th Cir. 1979).

Assuming that appeal at this juncture is appropriate, the remaining question is whether such an appeal should be taken to this Court or to the court of appeals. Section 5 of the Voting Rights Act states simply that "any appeal shall lie to the Supreme Court." The plain language of the statute thus seems to support this Court's appellate jurisdiction in the present situation, as well as after a decision on the merits. Conceivably, the words of Section 5 could be construed to comprehend only appeals from final judgments, but, as Mississippi observes (J.S. 7-9), such a construction would seem to run counter to this Court's reasoning in *NAACP* v. *New York*, 413 U.S. 345 (1973). Although the entire controversy

volved the same "matter" because they both contemplated the substitution of the same open primary election system for the State's existing party primary system. The issue before the Attorney General in both 1970 and 1979, and the issue in this litigation, is whether the open primary system has the purpose or will have the effect of "denying or abridging the right to vote on account of race or color," within the meaning of Section 5 of the Voting Rights Act. Jerris Leonard was substantially involved in the Justice Department's consideration of that matter in 1970, and his involvement then should preclude his representation of Mississippi now.

The State contends (J.S. 15, 17), however, that the 1979 legislation is a different "matter" because it was "passed by a different legislature" and signed by a different governor, "in a state that has changed socially, politically, demographically, and economically since 1970." The argument is unpersuasive. Mississippi's statutory proposal is the item subject to review under Section 5, and Mississippi's statutory proposal has not changed. The identities of the state legislators who supported the proposal are irrelevant, at least to the question of effect. So is the identity of the state executive officer who approved the legislation. The allegedly changed circumstances in the State may have some effect on the probability that the open primary system will operate to deny or abridge the right to vote on account of race or color, but it does not alter the nature of the controversy.

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in *NAACP* had ostensibly been resolved by the district court before this Court heard the prospective intervenor's appeal from the denial of its motion to intervene, the Court did not suggest that its appellate jurisdiction depended on the existence of a final judgment by the district court. For these reasons, we believe that Mississippi has properly appealed the district court's disqualification order directly to this Court.

Just as the unavailability of a key witness might affect the outcome of a criminal trial, so shifts in a State's racial composition might affect the validity of a particular voting change under Section 5. But, for purposes of attorney disqualification, the "matters" would remain the same. The prosecutor at a defendant's first trial could not be the defense attorney at a retrial following appeal, even if the evidence had substantially changed in the interim. Likewise, a government attorney who has once reviewed a particular submission under Section 5 should not be permitted later to defend an essentially identical submission, merely because some of the factors relevant to the matter's resolution may have changed with time. See *General Motors Corporation* v. *City of New York*, 501 F.2d 639 (2d Cir. 1974). Although the district court will, of course, consider current conditions in its evaluation of the 1979 submission, conditions existing in Mississippi before 1970 remain relevant to the court's decision under Section 5. In all likelihood, therefore, the present litigation will involve many of the same facts reviewed in 1970.

Mississippi also asserts (J.S. 19-20) that an attorney should not be disqualified in the absence of some showing that his participation will "taint" the judicial proceeding involved. But it is the adverse effect on public confidence, rather than on particular litigation, that courts have found to justify disqualification of a former government lawyer in these circumstances. Disqualification is necessary to ensure against even the appearance that attorneys, while working for the government, may conduct their official business with an eye to future private employment on the same case or matter.[8]

[8] Mississippi emphasizes (J.S. 19) that, in his capacity as Assistant Attorney General, counsel neither approved nor dis-

Accordingly, where the personal disqualification of a former government attorney is at stake, no actual effect on an upcoming trial need be proved as a prerequisite for judicial intervention. *General Motors Corporation* v. *City of New York, supra,* 501 F.2d at 649. See also Formal Opinion 342, 62 A.B.A.J. 517 (1975).[4]

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approved the State's 1970 submission. For this reason, the State argues, there is no prior government action that counsel might be asked to " 'uphold or upset' " as a private attorney. But neither 18 U.S.C. 207, nor Justice Department regulations, nor the ABA's Code of Professional Responsibility refers only to government attorneys who have made a formal decision on a matter. Rather, Section 207 refers to attorneys who have "participated personally and substantially * * * through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise * * *." See also 28 C.F.R. 45.735.7; 45 Fed. Reg. 7409 (1980). The ABA Code refers to attorneys who have had "substantial responsibility" in a matter while serving as government employees. In short, formal action on behalf of the government is not a prerequisite for the applicability of the restrictions on former government attorneys' practice that are at issue here.

[4] In *Armstrong* v. *McAlpin,* 625 F.2d 433 (2d Cir. 1980) (en banc), vacated on other grounds, No. 80-431 (Jan. 19, 1981), on which Mississippi relies (J.S. 20), the court of appeals affirmed an order disqualifying a former government attorney. The discussion of "taint" appears in the context of the court's consideration of the question whether a screen could be created between the attorney and other members of his firm so that the firm could continue to represent its client. 625 F.2d at 445-446. Mississippi now represents (J.S. 24 n. 29) that its attorney has offered to screen himself from the other members of his firm, who would continue to handle the Section 5 litigation following Leonard's disqualification. The State has not shown that an effective screen can be erected, and, more important for present purposes, it has not sought reversal of the district court's disqualification order on this ground. Although screening is undoubtedly a useful tool in appropriate cases, counsel here has already partici-

Finally, Mississippi argues (J.S. 21-23) that the government, by permitting Leonard to represent Mississippi in other litigation involving the state's voting practices, has waived its right now to seek his disqualification. The State contends (J.S. 21) that the waiver occurred when the United States failed to object to counsel's participation in *Connor* v. *Finch*, 431 U.S. 407 (1977), and in *Mississippi* v. *United States*, 490 F. Supp. 569 (D. D.C. 1979), aff'd, 444 U.S. 1050 (1980). However, neither of those cases involved the proposed adoption of an open primary system; they concerned the legality of court-ordered and legislative reapportionments of the Mississippi legislature. Those reapportionments did not involve matters in which Leonard had participated personally and substantially as Assistant Attorney General. The rule applied by the district court in this case is a narrow one and certainly would not operate as a total ban against counsel's representation of Mississippi in voting litigation.

In any event, a party's failure to seek disqualification in one lawsuit cannot justify the improper participation of a former government attorney in a later

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pated substantially in the preparation and conduct of Mississippi's case.

Neither *Board of Education* v. *Nyquist*, 590 F.2d 1241 (2d Cir. 1979), nor *Society For Good Will To Retarded Children, Inc.* v. *Carey*, 466 F. Supp. 722 (E.D.N.Y. 1979), on which the State also relies (J.S. 19-20), involves disqualification of a former government attorney. Indeed, the district court in *Society For Good Will* specifically acknowledged (466 F. Supp. at 725) that "where a former government attorney seeks to represent private clients on matters for which he or she had responsibility while in public employ * * * dicta suggest that appearance of impropriety alone may sometimes result in attorney disqualification."

case. As one court of appeals has written, "disqualification is in the public interest [and therefore] the court cannot act contrary to that interest by permitting a party's delay in moving for disqualification to justify the continuance of a breach of the Code of Professional Responsibility." *Emle Industries, Inc.* v. *Patentex, Inc.*, 478 F.2d 562, 574 (2d Cir. 1973). See also *United States* v. *Standard Oil Co.*, 136 F. Supp. 345, 351 n. 6 (S.D.N.Y. 1955).

CONCLUSION

The order of the district court should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JAMES P. TURNER
Acting Assistant Attorney General

JESSICA DUNSAY SILVER
MARK L. GROSS
Attorneys
Department of Justice

MARCH 1981

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No. 80-1183

APR 8 1981

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF MISSISSIPPI,
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v.

WILLIAM FRENCH SMITH, Attorney General, and
UNITED STATES OF AMERICA,
Appellees.

On Appeal from the United States District Court for the District of Columbia

---

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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IN THE

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OCTOBER TERM, 1980

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BRIEF IN OPPOSITION TO MOTION TO AFFIRM

The Government has taken a position in its Motion to Affirm that, if upheld, will make "the sacrifices of entering government service . . . too great for most men to make." *United States v. Standard Oil Co. (New Jersey)*, 136 F.Supp. 345, 363 (S.D.N.Y. 1955). The Government states:

> The issue before the Attorney General in both 1970 and 1979, and the issue in this litigation, is whether the open primary system has the purpose or will have the effect of "denying or abridging the right to vote on account of race or color," within the meaning of Section 5 of the Voting Rights Act. Jerris Leonard was substantially involved in the

> Justice Department's consideration of that matter in 1970, and his involvement then should preclude his representation of Mississippi now.

Motion to Affirm at 8. Adopting this approach to the disqualification of former government attorneys will impair both the client's ability to retain counsel of its choice and the government's ability to attract non-career attorneys.

By defining the "matter" on which disqualification is based as dilution of black voting strength, the Government seeks to equate the 1979 submission by the State of Mississippi, which is at issue in this case, with the 1970 submission considered by Mississippi's attorney, Jerris Leonard, while he was Assistant Attorney General for Civil Rights. This broad interpretation of "matter" "will prevent [an attorney] from engaging in practice of the very specialty for which the government sought his service." *United States v. Standard Oil Co. (New Jersey)*, 136 F.Supp. at 363. This cannot be the intended or the desired result of the laws prohibiting conflicts of interest.

Properly framed, the issue before the three-judge court below is whether Mississippi's 1979 submission has the "effect" or "purpose" "of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c.

"Effect" can be determined only by comparing the predicted results of implementing the requested change in election procedures with the present position of racial minorities. *See Beer v. United States*, 425 U.S. 130, 141 (1976) ("the purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise"). That determination can be made only by examining the relative political status

of black Mississippians *today*.[1] Regardless of the similarity or dissimilarity of the 1970 and 1979 statutes, Mr. Leonard could not have examined in 1970 the effect that legislation passed in 1979 would have on black voting strength in 1981.[2]

"Purpose," like "effect," must be determined in the present, not in the past. *See City of Richmond v. United States*, 422 U.S. 358, 375 (1975) (emphasis added) ("the controlling factor in this case is whether there are *now* objectively verifiable, legitimate reasons for the annexation").

Under the law of Mississippi, the legislature that passed the 1979 law at issue in this case is not the same as that which passed the 1970 law. Miss. Const. § 36. The legislative purpose in passing the laws could have been entirely different, even if the language of both the 1970 and the 1979 laws had been identical.[3] In any

---

[1] The Government concedes that the district court will have to consider "current conditions" in evaluating the 1979 submission. Motion to Affirm at 9.

[2] The Government uses an ill-chosen analogy to attempt to illustrate its position. The Government presents a situation in which a former prosecutor seeks to represent a defendant when that defendant is retried for the same offense for which he was tried originally by the former prosecutor. The only change is the unavailability of a witness. Motion to Affirm at 9. No one can dispute that the first and second trials are the same matter because the defendant is being tried for the same crime. *See* ABA Code of Professional Responsibility, DR 9-101(B). However, if the former prosecutor tried the defendant for robbing a bank in 1970, there is nothing to prevent that same attorney from representing the same defendant charged with robbing the same bank in 1979. The matters are different.

[3] Contrary to the Government's representation, Motion to Affirm at 6, Mississippi does not concede that the 1970 and 1979 laws "would establish the identical open primary system," *id.*, but states in its Jurisdictional Statement that the two laws are "different." Jurisdictional Statement at 6. In any event, the similarity between the 1970 and 1979 submissions is not determinative.

event, Mississippi's purpose in passing the law reviewed by Mr. Leonard while he was the Assistant Attorney General for Civil Rights is, at best, weak circumstantial evidence of a different legislature's purpose 10 years later in passing the present law.[4] Thus, Mr. Leonard's former position at the Justice Department gives him neither an advantage nor the appearance of an advantage in his current representation of Mississippi.[5]

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[4] Time has brought about great changes in Mississippi's politics. *See* Jurisdictional Statement at 7. The passage of time brings this case within the principles announced in *Control Data Corp. v. IBM Corp.*, 318 F.Supp. 145, 147 (D. Minn.), *aff'd*, 430 F.2d 1277 (8th Cir. 1970), in which the court refused to disqualify a former Justice Department attorney from representing IBM despite the attorney's prior participation in the Justice Department's antitrust investigation of IBM some 15 years previously. The court refused to disqualify the former Justice Department lawyer primarily because "[t]he entire business of the computer industry has so completely changed and has developed so extensively since 1955 that the court cannot believe any information obtained by Mr. Hoffman . . . can possibly be of any value or use in connection with this case." *Id.* at 147.

[5] The Government states, "Mississippi *now* represents . . . that its attorney has offered to screen himself from the other members of his firm . . . ." Motion to Affirm at 10 n.4 (emphasis added). The implication that Mississippi has not presented this option to either the district court or to the Government is incorrect. In a letter dated March 20, 1980 to Drew S. Days, III, Assistant Attorney General for Civil Rights, Mr. Leonard's partner, Brian P. Gettings, stated:

> While we do not agree that there is sufficient ground for total disqualification, . . . we believe that a mutually acceptable solution to the problem may be achieved through continuation of the screening of Mr. Leonard, which has existed since the issue was raised, from all involvement in the pending lawsuit, a procedure commonly referred to in the profession as building a "Chinese wall."
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> . . . .

[Footnote continued on page 5]

Based upon the foregoing reasons, as well as those set out in the Jurisdictional Statement, this Court should deny the Government's Motion to Affirm.

Respectfully submitted,

/s/ Charles Morgan, Jr.

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Dated: April 8, 1981

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[5] [Continued]

You have our assurance that Mr. Leonard will be fully insulated from all aspects of the present case.

In a letter to Mr. Gettings dated March 27, 1981, Mr. Days rejected any use of a screen "under the circumstances with which we are presented." Mr. Days did not question the adequacy of the screening procedures implemented by Mr. Leonard's firm. Indeed, at no point until its Motion to Affirm has the Government ever questioned the adequacy of such screening procedures.

Finally, throughout the litigation, Mississippi and Mr. Leonard have proposed screening as an alternative to disqualification of Mr. Leonard and his law firm. *See* Jurisdictional Statement at 24 n.29; Memorandum in Opposition to Defendants' Motion for Order Disqualifying Plaintiff's Counsel at 13 n.1.

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of April, 1981, I caused three copies of Appellant's Brief in Opposition to Motion to Affirm to be deposited in the mail, first-class postage prepaid, to:

Solicitor General
Department of Justice
Washington, D.C. 20530

/s/ Edward Ashworth
EDWARD ASHWORTH